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Supreme Court, U.S.
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No. 02-1864

In The

Supreme Court of the United States

SALLE A. CONOVER,

Petitioner,

v.

AETNA US HEALTHCARE, INC.,
and AETNA LIFE INSURANCE COMPANY

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner Sallee A. Conover respectfully submits this supplemental brief to call the Court's attention to four newly decided cases that reemphasis this Court's need to grant certiorari. Those cases are *Kidneigh v. Unum Life Insurance Company of America*, ___ F.3d _____ , 2003 W.L. 22273320 (10th Cir., Colo. October 3, 2003; *Elliot v. Fortis Benefits Insurance Company,* 337 F.3d 1138)9th Cir. Mont. 2003; *Rosenbaum v. Unum Life Insurance Co. of America*, 2003 W.L. 2207855 (E.D. Pa. 2003); and *DiFelice, Jr. v. Aetna U.S. Healthcare*, 2003 W.L. 22346402 (C.A. 3 Pa. 2003).

1. In *Kidneigh*, the Tenth Circuit considered a case very similar to the case at bar and once again decided in the majority opinion that a state insurance bad faith law is both directly preempted because it does not come under the insurance savings clause, 29 U.S.C. § 1144(a), (b)(2)(B) and further that it conflicts with ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(1)(B). The majority of the opinion hones in on the conflict preemption rather than the direct preemption issue but acknowledges that its decision is based upon Supreme Court *dicta* rather than any case holding. The majority opinion acknowledges "[t]he Supreme Court has strongly indicated in dicta that a state law falling within ERISA's savings clause . . . would still be preempted merely by providing remedies beyond those prescribed in ERISA." Opinion at Page 3.

Judge Henry of the Tenth Circuit filed an opinion concurring in part and dissenting in part. Judge Henry concurs with that portion of the opinion where the Court determined under current case law interpretation a state law that provides remedies beyond those spelled out in ERISA is preempted under a conflict preemption analysis. Acknowledging that precedent is *dicta* but the Court is nonetheless compelled to follow those pronouncements. "This Court considers itself *bound* by a Supreme Court *dicta* almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996)" (Emphasis added by Court)(Opinion at Page 8). However, Judge Henry reasoned that direct preemption did not apply to this state insurance bad faith claim based upon more recent teachings by this Court. Judge Henry then makes the following observation in his conclusion:

> "ERISA was enacted as a balanced statute, offering certain protection to insurers while securing protection for insured patients who are at their most vulnerable when they suffer medical harm. Through the insurance savings clause, Congress specifically authorized the states to continue regulating the business practices of insurance companies. State regulation of insurance is an undeniably proper state function that permits states to respond to the specific aspects of their policy problems better than the one-size-fits-all

> approach the majority's reading emphasizes. The majority's approach helps dismantle the protective system devised by Colorado's legislature and courts for Colorado's citizens." Opinion at Page 19.

The Judge then goes on to state that he is bound by binding precedent of the Supreme Court and the Tenth Circuit and thus the claim is barred by conflict preemption but he believes that the majority's direct preemption approach analysis is unnecessary and probably incorrect as a matter of law.

2. In the case of *Elliot v. Fortis Benefits Insurance Company*, 337 F.3d 1138 (9th Cir. Mont. 2003), the Ninth Circuit appears to completely skirt the direct conflict preemption analysis that has plagued advocates for state insurance bad faith rights until recent pronouncements by this Court. In doing so, it appears that the Ninth Circuit believes that state insurance bad faith laws may now be saved from ERISA direct preemption. It reasons that the state law would nonetheless be preempted under a conflict preemption analysis much as the Tenth Circuit does.

3. In *Rosenbaum* the trial court comes to a different conclusion utilizing what petitioner believes is the appropriate statutory construction approach. Simply put the ERISA statute specifically saves insurance law. There is a general enforcement provision that up to this point has been utilized, and more and more as this Court

has receded from its strict McCarran-Ferguson test, as a way of defeating causes of action for extracontractual benefits. Judge Newcomer found three separate reasons why under appropriate statutory interpretation the savings clause should trump any conflict preemption analysis. First is that the savings clause is unambiguous. It being unambiguous, it clearly indicates the legislature's intent to save all state insurance laws without any further reservation. Second, the Court finds that this court's application of the doctrine that "expression of one thing implies the exclusion of another" as applied in *Pilot Life* and *Rush* contradicts Congress' express intent found in ERISA's plan language to save all state insurance law. Simply put the *implied intent* found in ERISA's Section 514(b)(2)(A) conflicts with Congress' *express intent* to save all state insurance law. Thirdly, the Court finds that conflict preemption analysis disregards the basic presumption against implied preemption, the matter already discussed by the petitioner in her initial petition.

4. Finally in *DiFelice, Jr.*, we are again presented with another case that shows why from a policy reason this Court should grant certiorari and should grant it in this case. Circuit Judge Becker's concurring opinion is an excellent analysis of the ERISA law and could well serve as a brief for petitioner on the merits of this case. As Judge Becker shows in his opinion the effect of the current ERISA law has a perverse effect due to the unavailability of extracontractual damages. It basically discourages the beneficiary from seeking the rights that ERISA was designed to protect and at the same time

encourages the insurer to deny those benefits without fear of any repercussions except for paying the benefits that should have been paid in the first place.

Petitioner is aware that this Court is considering other cases in conference but all of those cases deal with the availability of damages under a medical malpractice theory and really skirts the true problem that we have in ERISA today.

As a result of the ERISA scheme clever lawyers and courts have attempted to determine when a beneficiary is harmed by a claims denial decision and when the beneficiary is harmed as a patient in a medical decision. That is an interesting question but one that really ignores the true question that this Court should decide in light of the way the law has developed. First, it appears that any state insurance bad faith law that has developed such as Oklahoma's or is a part of a statutory scheme would most certainly be saved under the less restrictive test than that applied in *Pilot Life*. Second, is a state law that is directly saved under the ERISA statute nonetheless preempted under a conflict preemption analysis. Those two central and vital questions that demand answering will not be addressed in the other cases under consideration by this Court. Those questions will continue to be the subject of intense litigation and even more diversion until answered.

Respectfully Submitted,

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